IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.———

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINIONS.

No opinion was filed by the District Court. Its conclusions of law are stated on pages 60 and 61 of the record. The opinion of the Circuit Court of Appeals (Circuit Judges Phillips, Bratton and Murrah sitting, opinion by Judge Murrah) was filed November 6, 1942. It is set out on pages 120 to 125 of the record and is reported in 131 F. 2d 924.

II.

JURISDICTION.

The basis for the court's jurisdiction is stated on page 7 of the annexed petition for certiorari.

III.

STATEMENT OF THE CASE.

The material facts are stated on pages 2 to 6 of the annexed petition for certiorari.

IV.

ARGUMENT.

A.

The Circuit Court of Appeals Erred in According to Dicta of the Kansas Supreme Court the Effect of Overruling an Earlier Kansas Decision Upon the Precise Point.

The Circuit Court of Appeals recognized in its opinion that the only judgment rendered in the Kansas trial court was that the garnishment proceeding should be dismissed because the relief sought could not be obtained in that type of proceeding. In its opinion the Circuit Court of Appeals stated:

> "The Kansas trial court held that the American could not have reformation in a garnishment proceedings on the sole ground that reformation of the contract was not within the limited scope of the remedy afforded by garnishment proceedings. It stopped there, it did not hold that the judgment creditor could not have reformation in a proper proceeding." (R. 123, line 33)

The Circuit Court of Appeals also recognized that the only judgment rendered by the Kansas Supreme Court in *Stanfield v. McBride, Inc.* was that the trial court's judgment dismissing the garnishment proceeding be affirmed. The Circuit Court of Appeals stated:

> "The Supreme Court of Kansas affirmed the trial court holding that although fraud had been asserted, it was not within the issues of the garnishment proceedings, and could not be litigated there. (R. 124, line 1) * * * Our decision here therefore does not turn on res judicata as urged * * * ." (R. 124, line 11)

The Circuit Court of Appeals also recognized that anything in the opinion going beyond the question presented, whether the trial court correctly determined that the relief sought could not be obtained in a garnishment proceeding, was unnecessary to the decision by the Kansas Supreme Court. In its opinion the Circuit Court of Appeals said:

> "The Supreme Court of Kansas affirmed the trial court, holding that although fraud had been asserted, it was not within the issues of the garnishment proceedings, and could not be litigated there. It could have doubtless stopped there without unduly curtailing an exposition of the law relevant to the issues raised by the appeal." (R. 124, line 1)

The quoted sentences are a plain holding that anything further stated in the opinion of the Kansas Supreme Court was dicta. Dicta is defined by the Kansas Supreme Court as an expression in its opinions relating to questions which are not "squarely involved and squarely presented." (*State ex rel., v. Stonehouse Drainange District,* 152 Kan. 188, 102 P. 2d 1017)

Following the sentence last quoted the opinion of the Circuit Court of Appeals continues as follows:

> "But it did not elect to confine its decision to the bare procedural question presented, and in language too clear and relevant to be called dicta, it prescribed the substantive as well as the procedural standards which must govern the right of the American to recover in this case." (R. 124, line 6)

The fact that the portion of the opinion which the Circuit Court of Appeals held laid down a rule of law binding upon it was stated in clear and relevant language did not make it any the less dicta. The character of dicta is not changed because it is stated in positive terms.

In its opinion the Circuit Court of Appeals also states:

> "In these proceedings, unlike the garnishment proceedings on which the Supreme Court's decision was based, Miller-Morgan is named as a party defendant to the proceedings, apparently on the theory that its presence as a party defendant would cure the fatal defect in the state court proceedings." (R. 124, line 38)

The Kansas Supreme Court could not have held in *Stanfield v. McBride, Inc.,* supra, that petitioner could not assert the invalidity of the policy change in an action to which Miller-Morgan was a party without indulging in dicta, because Miller-Morgan was not a party to the case being decided by the Kansas Supreme Court, a fact to which the Kansas court called attention on three separate occasions in its opinion. (*Stanfield v. McBride, Inc.,* 149 Kan. 567, at pages 570, 571, 88 P. 2d 1002, at

pages 1003, 1004) The Kansas Supreme Court could not have decided that petitioner was not entitled to assert the invalidity of the unilateral change in the policy in an ordinary civil action without its expression being dicta because that situation was not presented to the court.

That the judgment of the Circuit Court of Appeals was based upon the authoritative effect given to the dicta of the Kansas Supreme Court is shown by the following portions of the opinion:

> " * * *Our decision here therefore does not turn on res judicata as urged, but rather upon the controlling law of Kansas as announced by its Supreme Court under identical facts.
>
> "The Supreme Court of Kansas plainly held that if fraud be admitted in the effectuation of the change in the contract between the Employers and Miller-Morgan, by which the interest of Strunk therein was cut off, the change was not void but voidable, and until Miller-Morgan elected to rescind, it was valid and binding on all parties. The court further held that since Strunk's interest in the contract as a contingent insured did not attach until after his right therein had been cut off, he had no enforceable interest therein unless and until Miller-Morgan elected to assert the fraud and to effect a rescission of the change which eliminated Strunk from the coverage in the policy. The court significantly noted that Miller-Morgan was not a party to the proceedings, had not asserted the fraud, or asked for reformation; that since the parties to the contract had a lawful right to limit the coverage by attaching the rider which eliminated Strunk's interest therein before it had attached or accrued, the American occupied the position of a stranger to the contract and could not raise either the question of fraud or the sufficiency of the consideration, and we

do not understand that this holding is in conflict with the doctrine announced in *Sluder v. National Americans,* 166 Pac. 482." (R. 124, line 11)

* * * *

"We need not explore the dimensions of the rule announced by the Kansas court beyond the precise language of its pronouncement. It is sufficient for our decision here to say that the presence of Miller-Morgan in this law suit does not add or detract from the right of the American to recover under the contract, and that the same fatal bar to its right to recovery exists here as it did in the Kansas court. It cannot assert the apparent fraud and it therefore cannot have reformation." (R. 125, line 16)

The dicta which the Circuit Court of Appeals accepted as a statement of applicable local law was in direct conflict with an earlier decision of the Kansas Supreme Court in *Sluder v. The National Americans,* 101 Kan. 320, 166 P. 482. This case was not mentioned, much less overruled by the Kansas Supreme Court in *Stanfield v. McBride, Inc.,* supra. In the Sluder case, Alvena Craig was the owner of a certificate issued by defendant fraternal benefit society in which plaintiff was named beneficiary. The certificate provided that upon the death of Alvena Craig the beneficiary should receive $200.00 per annum for ten years. Shortly before her death Alvena Craig, then in the last stages of tuberculosis, wrote defendant asking that some arrangement be made whereby she might receive some benefit under the certificate if she would surrender it to the defendant. A contract was entered into which provided that in consideration of defendant's payment to Alvena Craig of the sum of $20 per month during her lifetime, but not exceeding twenty-four months, Alvena Craig surrendered

the certificate and all rights thereunder. *Plaintiff had no vested interest in the certificate.*

Plaintiff sued, alleging that Alvena Craig was mentally incompetent at the time she entered into the contract and surrendered the policy, and that the surrender was induced by fraud of defendant. Plaintiff was unable to establish the fraud but did establish incompetency. It was contended that plaintiff could not question the validity of the cancellation of the policy. In overruling this contention the court said:

> "It is insisted that the plaintiff had no such interest in the insurance as to warrant her in challenging the validity of the change in the contract, or the surrender of the original certificate. The general rule is that the insured has complete control of his contract and may cancel it entirely regardless of the wishes or the consent of the beneficiary. *If a change was actually effected and a new contract made the plaintiff lost all right she had in the certificate. However, if the insured did not have the mental capacity to transact business or make a new contract the original one remained in force, and it constituted the only contract existing between the parties.* If the insured died without making an effectual change of contract the rights of the plaintiff accrued and she became entitled to the benefits specified in the certificate the same as if no attempt had been made to change or cancel the original contract. Until the insured died the plaintiff only had an inchoate interest in the benefit certificate, but if she died without making an effectual change of the contract her inchoate interest became a contract right, and she became entitled to assert her rights under the certificate and to challenge the validity of any steps or action previously taken in opposition to her rights. (Citing Cases.)"

In the Sluder case the Kansas Supreme Court decided the precise point involved in the present action. In that case a donee beneficiary having no vested right was held entitled to assert the invalidity of a cancellation of an insurance policy, which was voidable because of lack of capacity of one of the parties to assert to the cancellation. In the present case petitioner asserts the invalidity of a unilateral cancellation of part of an insurance policy, which was utterly void because the insured, Miller-Morgan Motor Company, did not assent to the cancellation and because it was unsupported by a consideration.

It is true that in its opinion the Circuit Court of Appeals stated, " * * * we do not understand that this holding is in conflict with the doctrine announced in *Sluder v. National Americans,* 166 Pac. 482." (R. 124, line 35) No reason for this conclusion was stated in the opinion nor was any furnished in the brief filed by respondent in the Circuit Court of Appeals. The only distinction between the present case and the Sluder case is that one case involved a liability insurance contract while the other involved a life insurance contract. We find no expression in any reported case that the two policies are governed by different rules. In both cases the beneficiaries were donee beneficiaries having no vested right and in both cases the invalid cancellations were effected prior to the occurrence of the contingency upon which the rights of the beneficiary became absolute.

While there has been no decision upon the point by the Kansas Supreme Court, every court which has passed upon the question has held that liability insurance contracts are governed by exactly the same rules as life insurance contracts so far as the rights of beneficiaries to reform the contract as to recover upon the true contract

are concerned. (*A. Rose & Sons, Inc., v. Zurich General Accident & Liability Co., Limited,* 296 Pa. 206, 145 A. 813; *Tuzinska v. Ocean Accident & Guarantee Corporation, Limited,* 241 App. Div. 598, 272 N. Y. S. 593, 246 App. Div. 565, 283 N. Y. S. 1008, 272 N. Y. 449, 3 N. E. 2d. 864; *Binswanger v. Employers Liability Assurance Corp.* 224 Mo. App. 1025, 28 S. W. 2d. 448; *Hunt v. Century Indemnity Co.,* 58 R. I. 336, 192 A. 799; *Flanagan v. Harder,* 270 Mich. 288, 258 N. W. 633)

The rule of *Erie Rly. Company v. Tompkins* is of recent origin. In ascertaining local law the Federal courts are continually confronted with the problem of the effect to be given dicta of local appellate courts. Further guidance from this court is necessary. We recognize that considered dicta may be accorded some weight in determining local law in the absence of a definitive holding. Surely, however, dicta should not be accorded the effect of overruling a contrary definite holding *by inference.* That situation is presented by the judgment of the Circuit Court of Appeals.

B.

The Circuit Court of Appeals Erred in According to Dicta of the Kansas Supreme Court Greater Weight Than That to Which It Would Have Been Entitled in the Trial Courts of the State of Kansas.

It is settled law in Kansas that dicta of the Kansas Supreme Court is binding upon no one. The rule is stated in *State ex rel. v. Stonehouse Drainage District,* 152 Kan. 188, 102 P. 2d 1017, as follows:

> " * * * and if purchance we had so declared and such declaration was broader than the legal questions we then had to decide it would have been mere dictum and not binding either on future litigants or

the court if or when, as here, a precise question of law is presented for decision which was not involved in the prior litigation. In State v. Mercantile Co., 103 Kan. 896, 176 Pac. 670, it was said:

> "'We can only decide questions which are squarely involved and squarely presented in an appeal; and if the court should now give a dogmatic negative to . . . (a question not in issue) . . . , it would only be dictum and nobody would be bound by it.' (p. 897.)"

In ascertaining local law the Federal courts are just as much bound by determinations of local appellate courts as to the effect to be given to dicta in their opinions as they are by any other authoritative statement of local law. The effect of *Erie Rly. Co. v. Tompkins* is to place the Federal courts in exactly the same position as the local trial courts in applying local law. Under the law of Kansas as determined by its Supreme Court the inferior Kansas courts are not bound by dicta in the opinions of its Supreme Court. The Federal courts are no more entitled to accept dicta as an expression of the local law in the face of a definitive decision to the contrary than are the inferior courts of the State of Kansas. The Circuit Court of Appeals erred in doing so.

C.

In According to Dicta of the Kansas Supreme Court the Effect of an Authoritative Statement of Local Law the Circuit Court of Appeals Rendered a Decision in Conflict With the Decisions of the Circuit Court of Appeals for the Fourth Circuit.

The effect to be given dicta of a local court in determining local law is stated in *New England Mutual Life*

Ins. Co. v. Mitchell, 4 Cir., 118 F 2d 414, certiorari denied 314 U. S. 629, 86 L. Ed. (Adv. Ops.) 72, 62 S. Ct. 60, as follows:

> "In the light of the decision in the Darden case, we do not think that the dictum in the Massey case upon which plaintiff relies has even persuasive value. But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not to be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state. As said by the Supreme Court of the United States in Carroll v. Carroll, 16 How. 275, 286, 14 L. Ed. 936, a case involving the interpretation of a state statute where the court was bound to ascertain and apply the state law: 'If the Court of Appeals had found it necessary to construe a statute of that state in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, stare decisis. The second grows out of the thirty-fourth section of the Judiciary Act (1 Stat. at L., 92) (28 U. S. C. A. sec. 725), which makes the laws of the several states the rules of decision in trials at the common law; and in as much as the states have committed to their respective judiciaries the power to construe and fix

the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the state, and has administered the law as thus construed. But this rule has grown up and been held with constant reference to the other rule, stare decisis; and it is only so far and in such cases as this latter rule can operate, that the other has any effect.'

"And after stating that the construction put by a state court upon a statute is not a decision to be followed within the stare decisis rule unless this was necessary to the determination of the rights of the parties before the court the court went on to give the reason for the rule that dicta are without binding authority as follows:

> " 'And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. State of Virginia,* 6 Wheat. (264) 399 (5 L. Ed. 257) this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison* (1 Cranch 137, 2 L. Ed. 60). And Mr. Chief Justice Marshall said, 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of

(In re City Bank) Ex parte Christy, 3 How. 292 (11 L. Ed. 603), and Peck v. Jenness, 7 (How.) 612 (12 L. Ed. 841), are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.'

"Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established stare decisis rule and its limitations. *Cf. West v. American Tel. & Tel. Co.*, 61 S. Ct. 179, 85 L. Ed. ..... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

To the same effect is the more recent decision of the same court in *Powell v. Maryland Trust Company,* 4 Cir., 125 F. 2d 260, certiorari denied 316 U. S. 671, 86 L. Ed. (Adv. Ops.) 937, 62 S. Ct. 1041.

The decision of the Circuit Court of Appeals in the present case is in conflict with the cases from the Fourth Circuit above cited insofar as it gives to dicta the binding effect of an authoritative statement of local law. The conflict is the more marked because the Circuit Court of Appeals in the present case has accorded to dicta the effect of overruling by implication an earlier Kansas decision upon the precise point. The conflict is important because the problem of the effect to be given dicta arises in so large a percentage of cases presented to the Federal courts for determination. The conflict should be resolved so that the several Circuit Courts of Appeals may follow uniform rules of ascertaining what the local law is.

D.

The Circuit Court of Appeals Erred in Interpreting the Opinion in Stanfield v. McBride, Inc. as a Holding That a Third Party Beneficiary Has No Standing to Question the Validity of a Change in an Insurance Contract Which Cuts Off His Rights.

Kansas is primarily an agricultural state. The overwhelming majority of the insurance companies engaged in business in Kansas are incorporated in states other than Kansas and are entitled to a determination in the United States courts of all controversies with citizens of Kansas where the amount in controversy exceeds $3,000. Under the decision of the Circuit Court of Appeals an insurance company may wrongfully cancel or change its contract without the knowledge or consent of the insured, yet after the contingency upon which the rights of the beneficiary attach he still cannot assert the void or voidable change in the policy. Such a rule of law sanctions fraud and permits a wrong without a remedy. Since so many controversies between insurance companies and

citizens of Kansas are within the jurisdiction of the Federal courts, several more cases involving the identical point may come before the United States District Court for the District of Kansas before the Kansas Supreme Court can correct the erroneous interpretation placed upon its opinion in *Stanfield v. McBride, Inc.* by the Circuit Court of Appeals in the present case.

The Circuit Court of Appeals has completely misinterpreted the opinion in *Stanfield v. McBride, Inc.*, 149 Kan. 567, 88 P. 2d 1002.

The opinion was required to be interpreted in the light of the particular facts to which it was applied. (*Foresman v. Foresman*, 103 Kan. 698, 176 P. 147; *Maresh v. Peoria Life Ins. Co.*, 133 Kan. 654, 3 P. 2d 634; *State v. Reed*, 145 Kan. 459, 65 P. 2d 1083.)

The judgment of the Kansas trial court in the garnishment proceeding was one of dismissal upon the ground that the relief sought was outside the limited scope of a garnishment proceeding. (R. 60, 105, 123, *Stanfield v. McBride, Inc.*, supra). The only appeal taken from this judgment was by W. C. McBride, Inc., whose position petitioner occupies. (R. 59, 102, 120, 122, *Stanfield v. McBride, Inc.*, supra.) Respondent could have taken a cross-appeal from the trial court's failure to render a judgment in its favor upon the merits by virtue of G. S. 1941 Supp. 60-3314 which provides:

> "When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he complains, he shall within twenty days after the notice of appeal is filed with the clerk of the trial court, give notice to the adverse party, or his attorney of record, of his cross-appeal and file the same with the clerk of the trial court, who shall forthwith forward a duly attested copy of it to the clerk of the supreme court."

The case came before the Kansas Supreme Court upon W. C. McBride's appeal alone. In that state of the record the court could have reversed the case and ordered judgment for W. C. McBride, Inc., it could have ordered a new trial, or it could have affirmed the judgment of the trial court. One thing it could not do was to order a judgment upon the merits in favor of the present appellant, Employers Mutual Casualty Company, because no cross-appeal had been taken. (*Lebanon State Bank v. Finch,* 137 Kan. 114, 19 P. 2d 709; *Jones v. Pohl,* 151 Kan. 92, 98 P. 2d 175.) The question of whether the invalidity of the attempted modification of appellant's insurance policy could be litigated in an ordinary civil action to which the other party to the contract, Miller-Morgan Motor Company, was a party, was not raised, briefed, nor argued. The opinion must be interpreted in the light of the question before the court, bearing in mind the limited scope of the court's review of the judgment of the trial court.

It is made perfectly plain in the opinion that the sole basis for the court's conclusion was the absence of Miller-Morgan Motor Company, one of the parties to the insurance contract, as a party to the garnishment proceeding. On pages 1002 and 1003 of 88 P. 2d 1002 (149 Kan. 567-570) the court concisely states the facts. In the last paragraph on page 1003, (149 Kan. 570) the court begins its discussion of the legal questions before it. In this paragraph the court states:

> "The Miller-Morgan Motor Company are not parties to this lawsuit. The policy was issued to them. * * *"

Everything which follows in the opinion must be read in conjunction with this statement which is reiterated on two more occasions in the opinion. (88P. 2d 1004, 149 Kan. 571.)

In the next paragraph of the opinion at the top of page 1004 (149 Kan. 570) the court states:

> "The ultimate question to be determined may be formulated thus: Where a contract is entered into for the benefit of a third person as beneficiary, does such beneficiary acquire a right at once upon the making of the contract and does such right become immediately indefeasible? May the original parties to a contract made for the benefit of a third person as beneficiary prior to the time such beneficiary has knowledge of such contract, or has acted upon the faith of such contract, or has in anywise changed his position, modify or discharge such contract?"

The court's question, quoted above, answers itself and is of importance only as the court points out that the question of whether a change had actually been effected could only be determined in an action to which both Miller-Morgan Motor Company and Employers Mutual Casualty Company were parties.

The court answers its question as follows: (88P. 2d p. 1004, 149 Kan. 571).

> "While no case directly in point has been called to our attention, we are clear that the original parties could by mutual consent, under the circumstances stated, modify the insurance contract by attaching the rider thereto."

In the following sentence of the opinion the court states the only question which it decided and the only question discussed in the opinion as follows, *"Could such change in the contract be questioned by the plaintiff McBride under the issues framed in the garnishment proceedings, the insured motor company not being joined as a party?"*

In the same and in the succeeding paragraph of the opinion the court distinguishes the case of *Riddle v. Rankin,* 146 Kan. 316, 69 P. 2d 722, upon the ground that in that case the insured was a party to the proceedings. The Stanfield case was identical with the Riddle case in every other respect.

On page 1005 (149 Kan. 572) the court states:

> "Complaint is made of the exclusion of testimony to show the rider was attached through fraud. Although our statute G. S. 1935, 60-951, provides that the proceedings against a garnishee shall be deemed an action against the garnishee and defendant as parties defendant, no issue of fraud was raised in the garnishment proceedings. There was no error in the exclusion of such testimony."

It is clear from the opinion as a whole that the reason the court held that the evidence was properly excluded was that the court adopted the view that the defrauded party Miller-Morgan Motor Company was a necessary party to any action in which a determination that the named assured had been defrauded was sought. In the present case want of assent to the change by the assured, Miller-Morgan, was directly raised by the pleadings and Miller-Morgan's successors were joined as parties.

On the same page of the opinion (149 Kan. 572) the court states:

"The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy. It does not show they are dissatisfied with the policy in its present form. The rider was attached August 28, 1936, yet Miller-Morgan, the insured thereunder, has never attempted to avoid it. This raises a strong presumption that the action of the agent of the defendant insurance company in attaching the rider was ratified by the insured, the Miller-Morgan Motor Company. The burden was on the plaintiff to establish his cause of action. As a condition precedent to his right of recovery it was necessary for the plaintiff to show that the omnibus clause had not been deleted from the original contract. That fact has not been established."

The basis for the court's statement is the view, expressed throughout the opinion, that Miller-Morgan Motor Company was an indispensable party to any proceeding to determine whether a valid change in the contract had been effected. The situation in the case at bar is vastly different from that mentioned in the quoted paragraph. In the case at bar the trial court found as a fact that no officer or agent of the Miller-Morgan Motor Company knew of the attachment of the rider deleting the omnibus clause until after the accident in which Strunk injured the Stanfield child. (R. 59.) As a conclusion of law, which necessarily resulted from this finding, the trial court held that Miller-Morgan Motor Company had not consented to the attachment of the rider. (R. 60) These findings and conclusions were approved by the Circuit Court of Appeals. (R. 123, line 23.)

From the moment the accident occurred the rights of the parties became fixed and any subsequent consent or ratification (there was none) would not have altered the rights of the parties one iota. (*Spann v. Commercial Standard Ins. Co.*, 8 Cir., 82 F. 2d 593)

Everything contained in the opinion was written in discussing the only question presented to and decided by the court, which it stated to be, "Could such change in the contract be questioned by the plaintiff McBride under the issues framed in the garnishment proceedings, the insured motor company not being joined as a party?" (149 Kan. 571, 88 P. 2d 1004). The Circuit Court of Appeals does violence to the opinion by ascribing to the Kansas Supreme Court an intention to lay down a rule of law sanctioning fraud in relation to a situation not before the court.

CONCLUSION.

We submit that the questions raised by the petition are of such importance as to justify their consideration by this court and that the petition should be granted.

Respectfully submitted,

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